LOS ANGELES BAR BULLETIN

In This Issue

VOL. 23 SEPTEMBER, 1947 NO. 1

LOS ANGELES
BAR BULLETIN

Official Monthly Publication of Los Angeles Bar Association. Entered as second class matter October 15, 1943, at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $1.00 a Year; 10c a Copy.

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A WORD FROM THE PRESIDENT

IN October the State Bar will inaugurate a long range program of continuing education of the Bar. Members of the Los Angeles Bar Association may note with satisfaction that our local association was the first in California to provide lecture courses for lawyers; that the State Bar program, as outlined, follows closely the pattern of our Los Angeles courses; and that the State Bar Committee on Continuing Education of the Bar, in announcing the State Bar plan, has generously referred to the Los Angeles program as one which "many justly regard as a model of cooperative effort."

The State Bar courses should have advantages over any local program. Since the lectures will be available in many localities, they will reach more lawyers. Since each individual lecture will be given several times, it may be expected that both the syllabi and the lectures will be prepared with especial care. Moreover, since the State Bar program involves cooperation between (1) the State Bar, (2) the University Extension of the University of California, (3) the Deans of the accredited California law schools, and (4) local bar committees, it will have the benefit of expert administrative and educational supervision, while main-

taining direct contact with practicing lawyers, both on a state and local basis.

Our own program of lectures, which had been arranged by our Committee on Law Lectures before the State Bar course was initiated, will be presented early in 1948, as originally planned. In subsequent years, however, it seems probable that the Los Angeles Bar Association may wish to join in the State Bar course, instead of presenting a separate series of lectures.

In any case, we are glad that law lectures will hereafter be presented on a statewide basis. Both as an Association and as individuals, we shall cooperate with the State Bar in this important extension of its work.

Paul Fussell

REPORT FROM CONFERENCE DELEGATES on the STATE BAR CONVENTION

STEVENS FARGO, Chairman of the Los Angeles Bar Association Delegation, reports that the 1947 State Bar Conference was extremely interesting and successful by the results accomplished.

Paul Fussell, as President of the Association, and J. L. Elkins, as Executive Secretary, attended the conference, as well as the delegates appointed by the association.

The Los Angeles Bar was well represented on the chairmanships of the various committees.

Lee Combs served as Chairman of the Nominating Committee.

Clyde Triplett acted as Chairman on Joint Tenancy and his report was well received.

Stevens Fargo was Chairman of the extremely active Resolutions Committee.

Norman Sterry, although not present, was nominated as Chairman of the Committee on Administration of Justice.

Richard Gandy of Santa Monica was named as Chairman of the Committee on Unlawful Practice of the Law.

At the outset of the conference there was the usual attack on the seating of the Los Angeles Bar Delegation. This attack

was led by Daniel G. Marshall representing the Los Angeles Chapter of the National Lawyers Guild, and the objection was made first in the Credentials Committee. This committee overruled the objection and recommended that the Los Angeles Delegation be seated. An objection was also made from the floor and was ruled out of order by the Chairman of the Conference, Delger Trowbridge, who also later ruled out of order a motion from the floor to exclude any bar association which discriminates in its admissions to membership. There appeared to be very little support for any of these objections or motions.

RESOLUTIONS ACTED UPON BY THE CONFERENCE

Regarding the resolutions proposed by the Los Angeles Bar Delegation, the resolution to make interpleader procedure under Section 386, C. C. P., conform to Federal Rule 22 was approved. The conference also adopted the resolution regarding Probate Code, Section 1461, covering notice of hearing of guardianship.

One of the matters of greatest interest at the conference was the resolution to make conclusive an exclusion of putative fathers in paternity actions by negative reports on blood tests. This resolution was initiated by Lee Combs and he spoke for its support. There was very active debate on the matter and the resolution finally lost by a close vote.

The conference refused to approve the efforts of the local delegation to change the order of instructions in criminal cases and the conduct on jury instructions despite able support by Everett W. Leighton. An effort to amend Section 583, C. C. P., which was started last year was withdrawn as the suggestions made by this resolution became law this summer.

OFFICERS FOR NEXT YEARS CONFERENCE

Harry Horton of El Centro was elected chairman of the Conference of State Bar Delegates for next year's session, succeeding Delger Trowbridge of San Francisco.

Named also to the executive committee of the conference were Raymond Thompson of Pasadena and N. F. Bradley of Visalia, who will serve one year. Willard Shea of Oakland, William T. Selby of Ventura and Forrest Macomber of Stockton were elected to two-year terms.

Kimpton Ellis of Los Angeles, Eugene Prince of San Francisco and Laurence J. Kennedy of Redding were named to three-year terms.

BY THE BOARD

RECENTLY a petition was filed with the Association's secretary for the amendment of the By-Laws so as to do away with the requirement that the Nominating Committee shall nominate two members to run against each other for a place on the Board of Trustees. The committee presenting the amendments argued that there was no logical reason for this, and that it was difficult to persuade defeated candidates to run again, thus resulting in some of the best material for the Board becoming unavailable.

The Board submitted the amendments to the members and they were adopted by a vote of 870 to 50. Also, the time for electing the Nominating Committee is changed, and hereafter it will be named at the regular meeting held in October instead of November, in each year, and the Committee will meet on November 10 instead of December 1, as heretofore. It shall then nominate one member of the Association for each of the offices of president, senior vice-president and junior vice-president, one active member for each position of trustee to be filled at the election, from the active members of the Association, and one affiliated member for each position of trustee, to be filled from the affiliated members of the Association. The list of the nominees shall be published not later than December 5, in the Los Angeles Daily Journal, or such other newspaper of general circulation among lawyers in the county as the Board may determine, and also posted in a conspicuous place in the office of the Association.

E. D. M.

THE COLORADO RIVER CONTROVERSY

James H. Howard, General Counsel,
The Metropolitan Water District of Southern California

THE long-standing controversy between water users, and claimants of California and Arizona, relating to the waters of the Colorado River, has been given wide publicity. The specific issues involved, however, are not so widely understood. It is the purpose of this brief article to outline the history of the documents giving rise to the controversy, and to indicate, without fully arguing, the major issues between the States.

The Hoover Dam was the first control reservoir of any magnitude constructed on the main stream of the Colorado River. Prior to its construction the flow of the river during the irrigating season was fully appropriated and used. In fact, during many years the flow was inadequate to serve the area dependent upon the river. The Gila River, one of the major tributaries of the Colorado, and around which much of the controversy centers, also was fully appropriated and, in large part, used. Except for a small part of New Mexico, the area affected by the Gila and its tributaries lies in Arizona.

In addition to the appropriations which could be served by the unregulated river, there were numerous applications for appropriations which could be served only by conservation of flood flows.

The necessity for flood control and silt control, and the demands for additional water for agriculture and for domestic and municipal use, brought about the pressure for the construction of large storage works in the lower Colorado River.

It had been indicated by the Supreme Court (*Wyoming v. Colorado,* 259 U. S. 419 (1922)) that on interstate streams affecting States which, within their own borders, applied the doctrine of appropriation (that is, first in time, first in right in the use of water), that doctrine would be applied between appropriators, regardless of State lines. The States of the upper Colorado River were unwilling to permit the development of the lower river without some protection for their future development, fearing, with some cause, that prior use of water so brought under control would create rights which would interfere with the full development of the upper States. Before the congressional authorization of Hoover Dam could be secured, it became necessary to make some arrangement which would protect the upper States in their slower development. The negotiations resulted in the Colorado River Compact.

The negotiators of the Compact first undertook to apportion the water to each of the seven States involved. Information on which to base such allocations was not available. The result was that the Compact makes no apportionment to any State, but divides water between the upper and the lower basins, the division point being at Lee Ferry, a point of measurement on

the river lying in Arizona a short distance below the Utah line. The Upper Basin consists of all territory draining to the river above Lee Ferry. The Lower Basin consists of all area tributary to the river below that point.

Drainage areas do not coincide with States lines. Generally speaking, the States of the Upper Basin are Colorado, Utah, New Mexico and Wyoming. The States of the Lower Basin are Nevada, Arizona and California, although parts of New Mexico and Utah are within the Lower Basin.

The Compact treats of the "Colorado River System." By definition, the System includes all tributaries in the United States. The Gila is thus brought under the Compact.

Article III(a) of the Colorado River Compact apportions in perpetuity to the Upper Basin the beneficial consumptive use of seven and one-half million acre feet per annum of water of the Colorado River System and, in like terms, apportions a similar amount to the Lower Basin. Article III(b) provides that:

> "In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum."

Article III(c) provides for the service of the then contemplated Mexican Treaty. It was estimated that beyond these requirements there would be excess and surplus water, and provision was made for the further apportionment of such water after the year 1963, when either basin shall have attained its full beneficial consumptive use under paragraphs (a) and (b) of Article III.

The Compact was signed at Santa Fe, New Mexico, in 1922, by the Commissioners from the seven States. However, its effectiveness depended upon ratification by the State legislatures and approval by the Congress. The Legislature of the State of Arizona declined to ratify the Compact. The bill which later became the Boulder Canyon Project Act (45 Stats. 1057) had been pending before the Congress for several sessions. It contained a provision that it should become effective only when the seven States of the Basin had ratified the Compact and the President of the United States had so declared. In the light of Arizona's refusal to ratify, an alternative clause was added, providing that, in the event that all of the seven States should not

ratify within six months after the adoption of the Act, the Act would become effective when six of the States, including California, had ratified, and California had agreed, by act of its legislature, to limit its use of Colorado River water to "4,400,000 acre feet per annum of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Compact," and the President had so declared. California and the other five States ratified the Compact. California also adopted an act in the language required by the Project Act, known as the "California Limitation Act" (1929 Stats., p. 38). The result of the reciprocal legislation, that is, the Boulder Canyon Project Act and the California Limitation Act, is a Statutory Compact. Such compacts and agreements, evidenced by legislation, have been recognized and held binding by the Supreme Court (*Poole v. Fleeger,* 11 Pet. 185, 209-210; *Searight v. Stokes,* 44 U. S. 151; *Neil Moore & Co. v. Ohio,* 3 How. 720).

The controversy between Arizona and California relates to the interpretation of the Colorado River Compact and the Statutory Compact, i. e., the Limitation Act. Upon the construction of these documents depends the availability of water for projects within the State of Arizona.

It is first argued by Arizona that, under the terms of the Statutory Compact, California renounced any claim to the 1,000,000 acre feet of water referred to in Article III(b) of the Colorado River Compact. The argument runs that such water is "apportioned" water, although not covered by Article III(a), and, inasmuch as California limited itself to a certain amount of the water apportioned by Article III(a) of the Compact, "plus one-half of excess or surplus unapportioned by the Compact," III(b) water is excluded from California's claim and is available only to Arizona. California, on the other hand, argues that the only water "apportioned" by the Compact was that referred to in Article III(a), that the additional 1,000,000 acre feet by which the Lower Basin is authorized to increase its beneficial consumptive use does not constitute an apportionment, but that such water is a part of the excess or surplus, one-half of which would turns on the meaning of the terms "unapportioned" and "excess

be available to California under the Limitation Act. The issue or surplus," as those words were used by the parties to the Statutory Compact.

Section 4(a) of the Project Act, which contains the text of the required limitation on California, was developed on the floor of the Senate during the debate on the Act (Congressional Record, 70th Congr., 2nd Session, Vol. LXX, part 1, p. 382, *et seq.*).

Without going into detailed citations, it appears clear that, in the minds of the Senators who participated in the debate, the words "excess or surplus unapportioned by the Compact" included the III(b) water, and that there was no intent to exclude California from participation therein. The Limitation Act, adopted by the State of California in response to the Project Act, is in identical terms, and the words therein used must be given the same meaning as was applied by the Senate.

The question naturally arises as to the significance of Article III(b) if it does not constitute an apportionment of water. The paragraph has two effects. First, it measures and defers the time when the Lower Basin may apply for additional apportionment under Article III(f) of the Compact. As was said by Mr. Delph E. Carpenter, Commissioner from Colorado, in reporting to the Governor of Colorado after the Compact was signed in 1922:

> "The repayment of the cost of the construction of necessary flood control reservoirs for the protection of the lower river country probably will result in a forced development in the lower basin. For this reason a permissible additional development in the lower basin to the extent of a beneficial consumptive use of 1,000,000 acre feet was recognized in order that any further apportionment of surplus waters might be altogether avoided or at least delayed to a very remote period. This right of additional development is not a final apportionment."

Mr. Carpenter's statement was before the Senate when the Project Act was passed (*Congressional Record,* 70th Congr., 2nd Session, December 14, 1928, pages 577-579, 584-585).

The paragraph also determines the time when the Upper Basin may be called upon to supply part of the water required for Mexico under treaty. Under Article III(c) of the Compact,

such contributions are required when the water in the river in excess of that "specified" in Articles III(a) and III(b) is insufficient to fulfill the treaty obligations.

It is interesting to note that in her brief, filed in the case of *Arizona v. California* (283 U. S. 423), in 1930, counsel for Arizona, in unequivocal terms, classified the III(b) water as "unapportioned." Since that time Arizona representatives have completely reversed their position. It is not the purpose of this memorandum fully to brief or argue the subject. Suffice it to say that when consideration is given to the text of the Colorado River Compact, the Boulder Canyon Project Act and the Limitation Act, and to the legislative history of the Project Act, the conclusion seems inescapable that the Arizona position with respect to the water referred to in Article III(b) is in error. The amount of water involved in this phase of the controversy amounts to at least 500,000 acre feet per annum.

Another major controversy relates to the method to be used in determining "beneficial consumptive use" under the Colorado River Compact. Arizona argues that, on rivers tributary to the Colorado, the correct measure is the depletition of the flow of the tributary at its point of confluence with the main stream, due to salvage and use upstream on the tributary. California measures the beneficial consumptive use at the place of use. The matter is of importance because the Gila River is a part of the Colorado River System. Each basin, and logically each State, should be charged with annual beneficial consumptive use for the purpose of determining when the aggregate of such uses allotted to the two basins, respectively, has been reached. All such uses are chargeable under Article III(a) of the Compact. The more that is charged to Arizona for uses on the Gila, the less III(a) water is available to that State from the main stream, and, in turn, the excess and surplus, one-half of which is available to California under the Limitation Act, is increased.

The Gila River, in a state of nature, was a wasting stream. In the lower one hundred miles of its course the bed of the river crosses a sandy desert waste involving great evaporation and transpiration losses. The best estimate available as to the average annual contribution of the Gila to the Colorado, in a state of nature, approximates 1,300,000 acre feet.

At the time the Colorado River Compact was made, the development of the Gila was well under way. By extensive pumping and storage works, practically the entire flow of the river in the Phoenix area has been conserved and put to beneficial use. Little, if any, water now reaches the lower part of the river, where the heavy losses formerly occurred. After making full allowance for certain large overdrafts which have been made within recent years, the average annual beneficial consumptive use of waters of the Gila system, measured at the site of such use, amounts to about 2,300,000 acre feet. If Arizona succeeds in applying the depletion theory as the measure of beneficial consumptive use, she will increase her claim to III(a) water from the main stream by 1,000,000 acre feet per annum. The excess water, one-half of which would be available to Arizona, would be somewhat decreased. The net effect of Arizona's success on the point involved would be an increase of about 660,000 acre feet per annum in her claim to main stream water.

The term "beneficial consumptive use" is not defined in the Compact, but apportionments to the Upper and Lower Basins were clearly made in terms of utilization, not in terms of main-stream depletion. Measured by the standard which was used by the framers and ratifiers of the Colorado River Compact, the beneficial consumptive use of water on the Gila River should be measured by the diversions from the Gila system, minus returns to the Gila system. Practically all of the 2,300,000 acre feet of annual flow in the Gila system is thus beneficially consumed.

Another phase of the controversy relates to the treatment of evaporation losses attributable to storage on the main stream. The California Limitation Act, in terms, relates to diversions from the river for use in the State of California. In Arizona's computations of water available for use in that State, the 4,400,000 acre feet of III(a) water to which California is limited is further reduced by a prorated part of main-stream reservoir evaporation losses in the Lower Basin, particularly at Lake Mead. In the light of the language of the Limitation Act, the 4,400,000 acre feet is to be measured by the net diversions from the river for use in the State of California, and may not properly be burdened further by evaporation losses. Approximately 550,000 acre feet per annum are involved in this question.

There are other points of difference. Those herein mentioned, however, present the main issues of law involved in the controversy. For fifteen years after adoption of the Boulder Canyon Project Act and the California Limitation Act, Arizona declined to ratify the Colorado River Compact. She was not willing to rely on the interpretation she now urges. Numerous conferences were held, in an attempt to work out the difficulties. In 1944 the Arizona Legislature adopted a resolution ratifying the Compact. At the same time the Secretary of the Interior made a contract with the State of Arizona which refers to the delivery of 2,800,000 acre feet of water from Lake Mead for use in that State. The contract itself expressly negatives the idea that the Secretary considered the water so agreed to be deliverd as dfinitely available to Arizona legally or physically, or to be of any particular class, that is, III(a), III(b) or excess or surplus. The contract, in terms, was made without prejudice to the claims of the several States. Since that time the Congress has adopted a bill authorizing the Gila-Wellton-Mohawk Project, calling for the diversion of about 600,000 acre feet per annum of main-

stream water. The bill seeking to authorize the Central Arizona Project involving a diversion of 1,200,000 acre feet per annum from the main stream is pending in Committee. Water is available for the last-mentioned project only in the event that Arizona is found to be correct in her interpretation of the Compact and the Limitation Act.

Senator McCarran of Nevada, for himself, and for Senators Malone of Nevada and Downey and Knowland of California, has introduced a resolution (S. 145) authorizing and directing the Attorney General to interplead the States of the Lower Basin, for the purpose of determining the conflicting claims with respect to water. Companion resolutions (H. R. 225 and H. R. 226) have been introduced on the House side. So far, Arizona representatives have declined to negotiate further and also have declined to arbitrate, and are resisting the authorization of litigation. Arizona seeks to secure a political, rather than a judicial, determination of the issues.

The controversy between the States is one of long standing. Every possible attempt has been made to settle the matter amicably. Inasmuch as the United States is a necessary party, the only way in which California can get into court on the subject is under authority of an Act of Congress. Every effort will be made to secure the necessary authority and to settle in the proper forum, that is, the Supreme Court of the United States, the issues involved.

Until this is accomplished, there appears to be no possibility of avoiding the unfortunate battles which for years have interfered with the amicable development of the lower Colorado River.

THE LAWYER IN POLITICS

By Bernard C. Brennan, of the Los Angeles Bar

A normal approach in presenting the topic, "The Lawyer in Politics," might be to point out the predominance of attorneys in our high governmental positions. Of the five California statewide constitutional officers, four are members of the State Bar. Our state legislature is likewise predominantly controlled by attorneys; twenty-seven of the eighty Assemblymen and thirteen of the forty Senators are attorneys. And so we might delve into the predominance of attorneys in our Congress,

and in other various strategic and influential positions. However, emphasis should be given another phase of the problem, affecting more the practical side of politics, to wit, how did these men get into public office and how do they remain there for successive terms?

The Era of Real Political Leadership

Until the last twenty or twenty-five years, candidates for office were leaders. Their reason for submitting their names to the people was to have endorsement for the principles for which they stood. They were fired by some great purpose they desired to have ratified and put into practice or kept in operation, as the case might be. Of course, as every rule has an exception, there are outstanding exceptions to this general principle, but essentially this statement is true. From the moment he announced his candidacy he started in selling his program to the people. If his constituents did not agree with him, he sought to change their ideas to conform with his own. The outstanding example of this era of candidate leadership is the Lincoln-Douglas campaign. Each candidate attempted to mold public opinion. Neither candidate was primarily interested in holding office for the prestige the office offered, but rather the objective was to be placed in a position to put into effect the principles propounded by them in the now famous Lincoln-Douglas debates.

The Present Era of Following Public Opinion

Now, and for the last twenty or twenty-five years, campaigns are operated on a more scientific basis. One who expects to be successful and what is term as a "sure fire" or a "can't miss" candidate first seeks to determine the desires of the people in his district. This has given rise to the vast machinery of the public opinion surveys. The first step in a campaign today is to call in the services of a public opinion survey agency. A series of questions is formulated, which when answered by the constituents will give an accurate measure of their desires on all current issues. The preliminary list of questions is then placed in the hands of experienced interviewers who go into the field and test the questions. If the questions are not readily understandable by the interviewee, they are modified. The final set of questions is then used to interview five hundred or more representative individuals in the area being sampled. The answers are then

tabulated and reflect the exact thinking of the people within two per cent of accuracy. The candidate is then in position to know what his constituents want. That then becomes his platform. He may, and frequently does, modify his position as his continuing surveys reflect a change of public opinion.

All of the recent statewide campaigns have been based upon such surveys. This is true of both of the principal political parties and of all the top candidates. The most recent senatorial campaign is an outstanding example of a modern scientific well-handled campaign, which brought the successful candidate from behind to a complete statewide success by a careful dovetailing of the candidate's utterances with the thinking of the people of the state, reflected through surveys.

After the election, the successful office holder (if his success is to be determined by the length of tenure of office) then continues to keep his ears to the ground listening for the "hoof beats of the next Gallup poll." He is a careful observer and student of all public opinion surveys and may even subscribe to a continuing survey in his own district to keep him posted upon the reaction of the people to his utterances and to the utterances of his opponents. The late President Roosevelt was a great follower of public opinion surveys, and the only time he had great difficulty with the people and seemed to lose power was when he disregarded the results of the surveys, notably in his efforts to enlarge the Supreme Court.

I wish to make it clear that I am not criticizing office seekers or office holders for following public opinion surveys. I simply make it as a statement of fact that this is now the common practice. In a representative form of government such as ours, it may well be that we more truly reach the ideal form of representation by the use of public opinion surveys. This modern trend, whether good or bad, has changed the type of person seeking office from a "community leader" to a "community follower." Here again, I must emphasize that there are outstanding exceptions to this rule. The reader can pick his own exceptions.

Effect of Mass Thinking

This changed viewpoint and complete swing to control by the mass thinking is a tendency now well recognized in all phases

of public life. The individual's influence is minimized, and it is only as individuals become or are a part of a majority that their influence has any effect. In pioneer days we could rest upon our laurels as individual citizens and allow our government to be influenced and directed by our political leaders. We are now in a new political era, when that leadership is directed by the followers. This is certainly cause for alarm and concern. It is the first step in the surrender of the people to the domination of the demagogue or any other type of citizen who can sway the people's thinking.

The future strength of our government and of our political leadership therefore rests upon the level of the thinking of the common mass of people. Our political office holders will be as good or as bad as their constituents want them to be.

The Lawyer's Responsibility in Helping to Form Intelligent Public Opinion

And now we come to the real place of the lawyer in politics, namely, leadership in formulating the thinking of the great mass

of people. The lawyer, by reason of his training, his ability and his natural place of leadership in the economic and social life of the community, has a greater opportunity than any other class of individuals to influence the thinking of those about him. He must become keenly interested in all phases of community life. Through his contact with large groups of stockholders, directors and other representatives of corporations, through his contact with labor organizations, social groups and business enterprises, he must seek to keep alive the principles upon which this government was founded and constantly strive to raise the standard of thinking of these people whom he is representing. The lawyer may naturally and logically influence his client's thinking, not only in the problems for which he has been retained, but in the problems of community importance facing them.

Leadership is no longer in the office holder himself. Leadership is in the formulating of the opinion of the masses, which in turn is reflected in the pronouncements and activities of the officials. The lawyer can no longer shirk his public responsibility as a leader in this modern sense of the word. Through letters to the editors, through public utterance, through committee activities in service clubs, Town Halls, and party organizations, he must keep his analysis of public problems before the masses of people so that in turn they may be absorbed by them, and then indirectly become a part of the governing force of our country.

A Parable Which May Be Presently Applicable

Let me tell you in my own words a parable from the Old Testament of a time the trees set out to select a king to rule over them. The committee of trees said to the olive tree, "Come thou

and rule over us," and the olive tree said, "Why should I leave my sunny slopes and fine fruit to come and rule over the trees?" The trees then turned to the fig tree and said, "Come thou and rule over us," and the fig tree responded, "why should I leave my sweet fruit to come and rule over the trees?" Disappointed, the committee of trees turned to the vine and said, "Come thou and rule over us," and the vine said, "Why should I leave my fruit which is used to make merry the hearts of men to come and rule over the trees," and as the committee of trees turned away, the brambles spoke up and said, "I will come and rule over the trees." (For the more accurate wording of this parable, I refer you to the 9th chapter of Judges.) This definitely illustrates the responsibility of those who are trained, and of high caliber, character and ability, to take their rightful place of leadership.

Conclusion

If attorneys and others who are qualified shirk their responsibilities, we can expect the "bramble"—the rabble rouser, the demagogue and the hate mongers to take over the leadership of our people. We are faced with our last great chance in this country of stopping forever the inroads of "isms." The challenge to the lawyer is not one which he can accept or reject. The lawyer must either accept his leadership in the modern political arena and turn the tide of our thinking onward and upward,—or by rejecting that responsibility he will allow our nation to be taken over by those who would destroy it completely.

CHARTING THE DIVORCE PROBLEM

By Ewell D. Moore, of the Los Angeles Bar

THERE'S something intriguing about a graph, especially when it is used to picture a trend. A clever graphist can show by one of those things that the human race is soaring to heaven on a fleecy cloud just as easy as he can demonstrate that it is hurrying to hell in a hamper. Mind you, I wouldn't attempt to poke fun at graphs and graphists. Both are far too clever. Besides, I don't always understand them, which to some will not come as a surprise.

If you are introducing a serious graph in order to show a trend, it is necessary to arrest the fluttering thought and focus the furtive glance of the reader. He will try to avoid it. He will have to be led up to it by some striking statement on whither

are we bound, hopelessly, on the wave of a trend. Then, on the next page, hit him smack in the eye with the peaks and pitfalls of the graph.

Recently, there was published somewhere a graph of a very serious problem which, I suppose, should make us all pause and ponder. It was on the problem of divorce, a subject that interests some lawyers professionally; a few intellectually, from a sociological point of view. This graph's complicated lines running here and there on the page, with marginal digits, showed that in the country, by and large, for every three point two marriages (graphically expressed: 3.2) there is a divorce in the courts.

Undoubtedly, a true graph depicting a trend on this subject is meant to stress our national morals; never anything to boast about, but which, right now, may be graphically shown to be at the extreme bottom of the graphists' descending line—and still going down. From a running start back in 1890, when the rate was sixteen point two (16.2), we have now sunk, graphically, to

three point two (3.2). The dotted lines of the graphist from this point are projected to indicate that in a few years the trend will carry us clear off the page.

Perhaps it would be better to moralize on this situation, suggesting how it could happen that we are going down instead of up; but nobody would read it, or if read would not be heeded. The trend has got to work itself out without any help from me. Besides, this is strictly hot-weather copy.

This subject of divorce, some phases of which are pictured in every day's newspapers, especially when the plaintiffs have good legs and teeth, is a very, very old one; and it never loses reader interest, apparently. Somebody has said that the wife is the plaintiff in about ninety percent of divorce suits filed. I wouldn't vouch for that figure. It is true, of course, that it is not made very tough for the ladies to step down with a decree in these days. It was a lot tougher for them way back in the days of Babylon, and a lot easier for the man.

Hammurabi, king of Babylon, who ruled about 2800 B.C., gave special attention to divorce in his famous code of laws. For violation of most of his laws, the penalty was quite definite and final, namely, prompt dispatch of the violator. But in the matter of divorce he was not so severe. For example, Section 141 of his laws, says:

> "If a wife spends her time, out of the house, behaves foolishly, wastes her husband's goods, and holds him in contempt, he can say 'I divorce her,' and send her away without paying back her dowry. If he does not say 'I divorce her,' he shall marry another woman, and the wasteful wife shall live in his house as a servant."

That made it nice for the man, but the idea of the divorced wife remaining as a servant for the new wife, suggests complications, and comes under the head of extreme and unusual punishment, even in Babylon. As how it would work out in Hollywood, for instance, is left to the imagination of a gifted scenarist. But Hammurabi was not without a sense of humor. In another law affecting the marital status he provided that the wife who trifles "shall be cast in the water, but the husband of the woman may rescue her, and the king may save the man."

That situation may safely be left to the judgment of the reader, or to be worked out by the graphist.

LEGAL ETHICS

OPINION NO. 165

(June 30, 1947)

ADVERTISING AND SOLICITATION—Where a group of persons who are injured in a common disaster forms a committee to ascertain ways and means to compensate and assist the injured victims, an attorney who has been consulted by the committee but has had no part in its organization or activities may accept employment by individual victims who personally request him to represent them, provided no member of the committee is compensated by the attorney and the committee as such obtains no interest in or control of the claims or litigation.

A member of the Los Angeles Bar has submitted the following statement and inquiry:

"1. An explosion occurred in which many persons were injured. Prior to the explosion only some of the injured persons were acquainted with each other.

2. An interested citizen who was not one of the injured persons, formed a committee composed of some of the injured individuals and himself. The purpose of the committee is to ascertain ways and means to compensate the injured victims of the explosion and to assist the injured victims. No compensation is received by any member of the committee including the person who formed it.

3. The committee selects two of its members to call upon several lawyers to obtain information concerning fees and costs to prosecute civil actions at law for the benefit of the victims.

4. The committee meets with Lawyer 'A'. Lawyer 'A' knew none of the members of this committee, including the person who originally formed the committee prior to this conference. Lawyer 'A' quotes a contingent fee to the committee and clearly states that no member of the committee can expect any compensation in any form whatsoever from Lawyer 'A' should any of the victims request Lawyer 'A' to represent him.

5. Sometime thereafter Lawyer 'A' is requested by the committee to attend a conference at the office of another lawyer, Lawyer 'B'. At this conference at which many of the victims were in attendance, the same information is imparted to the committee members and

also to Lawyer 'B'. During the discussion by the committee and its members concerning the attorney's fees, Lawyer 'A' is not present.

6. Thereafter the chairman of the committee telephones Lawyer 'A' and advises him that several victims have already filed civil suits with other lawyers. The chairman further advises Lawyer 'A' that some of the victims wish to retain Lawyer 'A' under the terms previously set forth by Lawyer 'A'. Lawyer 'A' consents to handle the cases if the victims so request him. Shortly thereafter the victims do telephone to Lawyer 'A' requesting an appointment to discuss the matter of retaining the lawyer to handle the civil actions on their behalf.
7. Naturally no compensation in any form whatsoever is to be paid to any person whomsoever in connection with the lawsuit except the normal expenditures in connection with witness fees, experts and other such matters.

Question:

Under the Canons of Legal Ethics and the Rules of Professional Conduct, may Lawyer 'A' properly represent these individual victims if they request him to represent them for the purpose of filing civil suits against certain defendants in connection with the explosion?"

It is our opinion that the inquiry should be answered in the affirmative.

From the facts submitted it appears that Lawyer "A" had nothing to do with the organization of the "committee" and had no prior acquaintance with any of its members. His participation in the conferences with the "committee" or its members is stated to have been limited to quoting a contingent fee arrangement and stating that no member of the "committee" would receive any compensation in any form whatsoever from him should he be employed to represent any of the injured persons. Whether an unlicensed person who solicits professional employment is compensated, of course, is not controlling, as any solicitation by an attorney directly or indirectly through an unlicensed person is in itself improper. There is nothing in the submitted statement, however, to indicate that Lawyer "A" directly or indirectly solicited the injured persons for employment. If the "committee" can be said to have been soliciting, it seems clear that it was acting as the representative of the injured persons and not of the attorney.

In Opinion 111 of the American Bar Association Committee on Professional Ethics and Grievances, May 10, 1934, it is declared improper for a lawyer to solicit strangers who are in the same class and have interests identical with or similar to those of unsolicited clients, but the Committee further stated: "However, we see no valid ground to condemn the lawyer involved for accepting as clients such persons in a similar situation to that of his client, who may, without his active intervention be persuaded by his client to employ him."

We think the quoted portion of the opinion is applicable to the present inquiry and establishes that Lawyer "A" may properly accept employment from injured persons who have been persuaded to employ him either by clients injured in the same

disaster who had already retained him or by the "interested citizen", provided, of course, that the lawyer had nothing to do, as appears from the submitted statement, with the persuasion practiced by his client or the "interested citizen". Indeed, solicitation of employment by a friend or acquaintance of an attorney without his consent or arrangement for the solicitation has been held not to constitute misconduct under the Rules of Professional Conduct of the State Bar. *Hildebrand v. State Bar,* 18 Cal. (2d) 816; *Werner v. State Bar,* 13 Cal. (2d) 666.)

In the Hildebrand case a doctor who was a personal friend of the attorney recommended his employment to several patients who had been injured in accidents. In its opinion the Court stated that there was no convincing showing of any arrangement between the doctor and the attorney and, "therefore, it is entirely reasonable to conclude that when petitioner went to the hospital he was doing so in entire good faith and upon the justifiable assumption that he was there to meet the persons who desired to employ him. There was no solicitation on petitioner's part or any unethical conduct in going to see those persons under such circumstances. If such were solicitation an attorney would never be permitted to speak to a prospective client concerning a prospective professional employment except in those instances only in which the client personally asks for the attorney to represent him in some matter."

The fact that the "committee" included a member who was "an interested citizen", not one of those injured in the explosion, does not warrant classification of the "committee" as a lay intermediary within the meaning of Canon 35 of the Canons of Professional Ethics of the American Bar Association. There is nothing in the submitted statement to indicate that the "committee" sought to control or exploit the professional services of Lawyer "A", but on the contrary it appears that his responsibility and relationship to his client would be personal and direct if he accepted the employment tendered him.

We assume that the "committee" was organized for the sole purpose of seeking advice and assistance for the victims of the explosion and that its members were endeavoring to carry out that purpose in good faith. Our conclusion is that under the facts as set forth in the submitted statement, Lawyer "A" may

properly accept professional employment from the persons injured in the explosion who desire to retain him.

This opinion, like all opinions of this Committee, is advisory only. (By-Laws, Article VIII, Sec. 3.)

THE VOICE OF THE HERD

By Frank G. Tyrrell, Judge of the Municipal Court

THE word "herd" is not used in disparagement. It is frequently encountered in sociology and cognate sciences, and is meant to indicate the multitude,—the voice of the herd is the public opinion of the time. There are times when it is entitled to respectful consideration. The obvious fact is, that we are all influenced by it, especially as it expresses itself in fashion, whether of dress, behavior, or thought. The slogan, "everybody's doing it," has a powerful appeal, but alone it is a poor excuse for action. Witness, *e. g.,* the automatic obedience to the recent edict lengthening dress skirts.

The zeitgeist—spirit of the age—is imperious, and if one would have a reasonable peaceful and happy career, he must understand it and adjust himself to it. But there are upsurges of opinion or of emotion which are mere incidents in social history, whose force is soon spent. Then it is that it is the part of wisdom to stop and consider, for any thinking that has its origin in emotion is suspect.

It goes without saying that the judge on the bench should be in sympathy with the spirit of the age. Not because it is politic to interpret and conform to it, but because of the truth there is in it. Times change, not always capriciously, but because of fundamental, creative and controlling social and economic forces. Who and what is the solitary individual, that he should disregard the surge of such a change?

However, one should be sure he correctly interprets the spirit of the age. How, for example, would this question be answered by a group of lawyers or judges; what is the zeitgeist respecting the judicial function? Is it entitled to respect and obedience? If some such question were addressed to a score of intelligent men of the law, we should doubtless receive a score of different answers. For as Cardozo points out, what one takes for the spirit of the age may be and often is the spirit of the group in

which by the accident of birth or association one finds one's self. (The Nature of the Judicial Process, 174-5.)

In the trial of causes, the careful and capable cross-examiner is always aware of the power of suggestion. Probably it is no exaggeration to say that the factor is always present, in the testimony of even the most veracious witness. His testimony is not the unvarnished recital of facts, accurately observed and remembered, but it is a blend of wishful thinking, suggestion, and drama. And the cross-examiner knows how to convey to his mind some subtle suggestion by the very form and matter of his question, and elicit a statement not wholly in accord with the intention of the witness, or indeed consistent with his previous testimony. In a similar way, the herd yields to herd suggestion.

The point is, that our own dearly cherished opinions and beliefs are not the product of independent observation or experience, and scientific analysis and synthesis, but the reflection of the composite influence of the group with which we are most intimately, or perhaps exclusively, associated; in other words, we are echoing the voice of the herd.

And the next step is to rationalize these concepts, considered as our own. We easily find reasons for them and are ever ready to defend them. Would it not be a good idea occasionally to challenge them? For it will be readily conceded that, first, the herd opinion or even conviction is often outmoded; and second, that it may be when most vigorous and vociferous, wholly erroneous, formed from facts dimly seen because out of focus, or wrongly grouped.

In a sense, I suppose tradition is the voice of the herd of the group that has passed on to silence and pathetic dust. There are values in it, but it must not fetter; tradition should be treated as just another element in the problem. In all thinking, we seek truth. And it is the entire absence of thought or at least very weak thinking merely to echo the voice of the present, or of the past. Lawyers and judges must be more than phonographs. In our thinking, we must march forward, not retreat or mark time.

The political theories of the present age are in the crucible, or better, in the furnace on the way to the crucible. It is amazing that we have been so slow to recognize the fact of world anarchy and its constant menace, and slower still to do anything

about it. Now that the menace has become that of annihilation and extinction, it may be that we shall awake, and with the co-operating and organized intelligence of all men capable of consecutive thought, end world anarchy forever. Here is a challenge comprehensible by the herd. Should *hoi polloi*, the many, refuse to hear it, or hearing it, refuse to heed, the kindliest judgment must be that they ignorantly invite the extinction that will follow, as inevitably as night follows day.

Men who by blind chance or intelligent choice of electorates occupy the place of leadership, are speaking, and theirs are about the only voices that are heard. Are they men of vision and understanding? Or to what extent are they reflecting the mental and moral mediocrity of their unthinking constituents?

This great question is not the only one which is being answered by the voice of the herd. Economics and industry and finance bristle with questions. There is no hope in the solutions of doctrinaires, certainly not of demagogues. Only in the collective wisdom of mankind can we find the real answer. As Lincoln said, "There is no other or better hope in the world."

In conclusion: first, take stock of your opinions and beliefs; to what extent are they shaped by surrounding influences, instead of having been reached by any process of cerebration worthy of being called thought? Second, when you hear the voice of the herd, listen with sympathy, but contrast it with the same voice when it spoke in other accents, and test its accuracy in the present setting of human affairs.

DIGEST OF REPORT OF COMMITTEE ON PSYCHOPATHIC COURT

THIS committee was appointed to study and investigate the provisions of law respecting the apprehension, custody, examination and trial of mentally irresponsible persons and the rules of court, practices and procedures currently followed in the psychopathic courts and offices in Los Angeles County in carrying out such provisions, and to study ways and means of improving the current methods of administering such laws. The committee has filed a most interesting report of its studies and of its meetings with officers and doctors. The committee investigated the need for enlarged or additional facilities to house mental patients in the county, particularly those awaiting hearings. It investigated the practices in the office of the Psychopathic Department of the County Clerk's Office, the effect of preliminary confinement pending hearings to cloud mental capacity to make contracts, the segregation of different classes of persons experiencing mental difficulties, the method of serving psychopathic

warrants, the lack of uniformity of administration in the various counties, the combining of medical attention with board and room in private institutions and many other problems which the committee felt were outside the scope of the committee's functions as defined in the letters of appointment. The report discusses the need for more definite definitions of the terms "insane," "mentally ill," etc., and the lessening of discretion in the commitment of persons. The report directs attention to a proposal pending in the Legislature to amend Section 6600 of the Welfare and Institutions Code and add an article 3.5 to the chapter on state hospitals for the insane to provide an alternative procedure for admission of mentally ill persons to state hospitals without a formal commitment and a subsequent procedure to determine insanity.

The committee suggested that its authority be enlarged to cover some of the matters discussed and to cover an investigation of the advisability of the segregation of persons held for hearing and persons committed and also an investigation of the law regarding the sterilization of persons incurably affected. The committee recommended further study and investigation of the matters referred to it.

In a supplemental report, the committee reports to the Board of Trustees regarding Senate Bill No. 523, which was sponsored in the recent Legislative Session by the State Department of Mental Hygiene. This bill provides for a third method whereby patients may be admitted to State Mental Hospitals, by an application of the local Health Officer accompanied by the certificate of two physicians made directly to the Hospital Superin-

tendent. The committee could see no reason to oppose such Legislation and reported favorably on the question as to its constitutionality. The Board of Trustees likewise authorized active participation in favor of this bill, which was passed at the last session of the Legislature.

The committee is composed of the following: Steadman G. Smith, Chairman; W. I. Gilbert, Jr., Board Member; James A. Broderick, Jr.; Leonard A. Diether; Leslie L. Heap; Deane F. Johnson; Robert S. Morris, Jr.; Russell Seymour and John A. White.

STATE BAR ELECTS OFFICERS FOR THE COMING YEAR

Officers of the State Bar of California, elected by the Board of Governors following the annual meeting of the State Bar of California in Santa Cruz, Sept. 12, are:

President, F. M. McAuliffe, San Francisco;

Vice-presidents, Sidney L. Church, Salinas; John G. Clock, Long Beach; Eugene Best, Riverside; and treasurer, Jerry Giesler, Los Angeles.

Newly elected members of the Board of Governors, announced at the Santa Cruz meeting are A. M. Mull, Jr., Sacramento; Frank V. Campbell, San Jose; A. B. Bianchi, San Francisco; Warren E. Libby and Pierce Works, both of Los Angeles.

BOARD OF GOVERNORS LIMITS ADMISSION TESTS

The Board of Governors of the State Bar has voted to restrict the number of times that a law student make take the State Bar examination. In its action the Board decided to restrict the number of attempts to become a lawyer to three. Those students who have already taken the bar three times will be given two more chances, or five in all.

Law students who have not yet taken the examination, under the new regulations soon to be established, will have only three chances to pass the bar.

The committee which has investigated the matter cited the fact that certain law students have taken the bar repeatedly—in one instance thirteen times—and failed to pass. The Board felt that it was proper to make some reasonable limit.